BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LINDA J. PAYNE	)	
Claimant	)	
	)	
VS.	)	
	)	
THE BOEING COMPANY	)	
Respondent	)	Docket Nos. 1,007,073 &
	)	1,020,332
	)	
AND	)	
	)	
KEMPER INSURANCE COS. &	)	
AMERICAN MFR. MUTUAL INS. CO.	)	
Insurance Carriers	)	

ORDER

Claimant[1] requested review of the August 23, 2006 Award by Administrative Law Judge (ALJ) Nelsonna Potts Barnes. The Board heard oral argument on December 15, 2006 in Wichita, Kansas.

APPEARANCES

Michael L. Snider, of Wichita, Kansas, appeared for the claimant. Eric K. Kuhn, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. In addition, the parties have agreed that there is no dispute that claimant is permanently and totally disabled under K.S.A. 44-510c(2).

[1] Respondent and its insurance carrier also filed an Application for Review but shortly thereafter, withdrew that application. Nonetheless, claimant continued to pursue this appeal.

ISSUES

The ALJ found the claimant was permanently and totally disabled and entitled to a maximum award of $125,000, but that respondent was entitled to a credit for a 35 percent preexisting functional permanent impairment under K.S.A. 44-501(c).

The claimant requests review of this Award[2] and maintains the ALJ erred in concluding that claimant's permanent total Award was affected by the offset provided in K.S.A. 44-501(c) in light of the Kansas Supreme Court's holding in *McIntosh*.[3]

Respondent contends the ALJ's Award should be affirmed in all respects. Respondent maintains that the principles set forth in *McIntosh* do not apply to this claim, or to the offset respondent is entitled to under K.S.A. 44-501(c).

The sole issue to be addressed in this appeal is whether the offset provisions of K.S.A. 44-501(c) reduce claimant's entire permanent total award under the Kansas Workers Compensation Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant worked for the respondent for 23 years and admits to prior low back problems and multiple surgeries for those problems. Her ongoing symptoms were significant enough that ultimately she had a spinal cord stimulator implanted in her back in an effort to minimize her pain complaints.[4]

According to Dr. P. Brent Koprivica, the only physician who testified in this matter, claimant was suffering from a significant preexisting impairment before June 2002, her date of accident in this matter. He categorized her (pre-accident) condition as "profound" and diagnosed "failed back syndrome."[5] Dr. Koprivica assigned a 35 percent permanent

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[2] Respondent appealed the Award as well but after docketing the appeal, attempted to withdraw its appeal. Claimant did not agree and therefore, the appeal proceeded.

[3] *McIntosh v. Sedgwick County*, No. 93, 762, Sup. Ct. Opinion filed Dec. 8, 2006.

[4] R.H. Trans. at 14.

[5] Koprivica Depo. at 14.

partial impairment to claimant for her failed back syndrome and testified that all of this 35 percent preexisted the claimant's subsequent injury which is the focus of this claim.[6]

In spite of all these significant health problems, medical treatment and resulting restrictions, claimant returned to work for respondent at accommodated positions. On June 3, 2002, the claimant was lifting a stack bin of parts and as she turned her back went "out" and she fell to her knees.[7] Claimant's treatment for this injury ultimately involved a hemilaminectomy and discectomy and later an anterior lumbar interbody fusion at L5-S1. During the course of her treatment, she was involved in an automobile accident while on the way home from a medical appointment. This event served to only further complicate her recovery. There is no dispute that claimant is permanently and totally disabled as a result of her June 3, 2002 accident and the subsequent compensable automobile accident.

As a result of this stipulation as to claimant's status, the only issue left to determine is how to calculate the compensation due to claimant. The outcome of this case turns on the relationship of the offset provision in K.S.A. 2005 Supp. 44-501(c) to the other provisions in the Act that specifically address permanent total disability compensation.[8]

Respondent argues that the plain language of K.S.A. 2005 Supp. 44-501(c) requires the *entire* workers compensation award to be reduced by that percentage of the preexisting functional impairment. In order to accomplish this, respondent offers the following computation to effectuate the offset:

	$125,000.00 permanent total award
less	$ 53,672.07 paid in temporary total disability benefits
	$ 71,327.93 remaining amount payable
less	$ 60,569.25 (the value of the 35 percent functional impairment)[9]
	$ 10,758.68 (amount respondent contends is owed)

Respondent justifies its method of calculation by explaining that the offset for preexisting impairment contemplated by K.S.A. 44-501(c) involves a percentage of

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[6] Dr. Koprivica testified that this rating is based upon his examination and a review of the contemporaneous medical records relating to the claimant's treatment between 1996 and 2001. And the rating is based upon the principles set forth in the 4th edition of the *Guides*.

[7] R.H. Trans. at 13.

[8] See K.S.A. 44-510c(a)(1) and K.S.A. 44-510f(a)(1).

[9] This figure represents the mathematical result of 415 weeks (maximum weeks available for a functional impairment) x 35 percent (preexisting impairment) x $417 (weekly rate of compensation)

functional impairment and the value of that preexisting impairment, under K.S.A. 44-510e, is determined by multiplying the percentage of functional impairment by 415 weeks and then multiplied by the appropriate rate of compensation. The resulting figure is then deducted from the $125,000.

Respondent's methodology was adopted by the ALJ and an Award was entered for the sum of $10,758.68.

Claimant contends this outcome is in direct conflict with the Kansas Supreme Court's recent pronouncement in *McIntosh*.[10] In *McIntosh*, the Court was asked to consider to the relationship of the retirement offset provision in K.S.A. 2005 Supp. 44-501(h) to the other provisions in the Act that specifically address permanent total disability compensation.[11] The *McIntosh* Court concluded that while the retirement offset provided for in K.S.A. 44-501(h) would reduce the *amount* of a claimant's weekly payments, that offset was unaffected by the provisions of K.S.A. 44-510c(a)(1) which provides for the payment of $125,000 for a permanent total disability. In doing so, the Court reasoned that K.S.A. 44-510c(a)(1) states that "[t]he payment of compensation for permanent total disability shall continue for the duration of such disability". The Court also held that the purpose of the 501(h) retirement offset was to avoid duplication of wage loss benefits. And that "[p]lacing a time limit on the number of weeks that a claimant may receive such benefits does nothing toward preventing duplication of wages and runs counter to the express provisions of K.S.A. 44-510c(a)(1)".[12] So, the claimant in *McIntosh* would eventually receive the entire $125,000 contemplated by the statute, albeit at a reduced weekly rate.

Respondent contends the claimant's reliance on *McIntosh* is wholly misplaced. Respondent argues that *McIntosh* relates only to the interrelationship of the two statutes dealing with a permanent total award and the retirement offset. The retirement offset statute, K.S.A. 44-501(h), refers to an offset which is to be calculated based upon a *weekly* sum rather than a *percentage* of functional impairment, as in 501(c). And, unlike in *McIntosh*, the only way K.S.A. 501(c) and 510c(a)(1), the only two statutes involved here, can be harmonized and both be given effect, is to apply the percentage to the net amount left after the temporary total disability benefits are subtracted from the $125,000.[13]

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[10] *McIntosh v. Sedgwick County*, No. 93,762, Sup. Ct. decision filed Dec. 8, 2006.

[11] See K.S.A. 44-510c(a)(1) and K.S.A. 44-510f(a)(1).

[12] *McIntosh v. Sedgwick County*, No. 93,762 at 8, 9.

[13] At oral argument respondent conceded that the only credit it is requesting is that available under K.S.A. 44-501(c).

Respondent asserts that the failure to account for the statutory offset in this manner negates the statutory mandate.

The Board has considered this matter and finds that the ALJ's Award should be affirmed. Although claimant argues that her June 2002 accident involved a new area of her back and not any sort of aggravation, Dr. Koprivica specifically testified that claimant suffered an aggravation to her preexisting condition. And the Board is persuaded by this opinion. Thus, the claimant's reliance on *Lyons*[14] is misplaced. In *Lyons*, the employer sought a credit for a preexisting impairment against an employee's permanent total disability award. The Board refused such a credit finding that the respondent failed to prove that claimant had aggravated his preexisting condition and thus, the credit contemplated by K.S.A. 44-501(c) did not apply. That factual finding was upheld by the Court of Appeals. *Lyons* does not stand for the proposition that a 501(c) credit does not apply against a permanent total disability award.

Turning now to the *McIntosh* case and its potential implications to the instant set of facts, the Board finds that the principles at work in *McIntosh* do not apply to a permanent total disability and the credit called for by K.S.A. 44-501(c) for a preexisting functional impairment. *McIntosh* was concerned with a duplication of wage loss benefits. There is no such concern in the present scenario. Claimant is admittedly entitled to a total of $125,000 in permanent total disability benefits and has received a significant amount of those benefits in the form of temporary total disability benefits. But the evidence is uncontroverted that she had a 35 percent preexisting functional impairment before her June 2002 accident. In order to give effect to K.S.A. 44-501(c), a credit must be taken against the balance of the $125,000 yet to be paid. And while it is unfortunate that she did not receive any workers compensation benefits for the preexisting 35 percent[15], that fact does not invalidate the statutory mandate that relieves respondent for any liability for preexisting conditions. The statute, K.S.A. 44-501(c) does not require the payment of workers compensation benefits in order to qualify for a credit. Rather, it only requires a ratable functional impairment.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated August 23, 2006, is affirmed.

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[14] *Lyons v. IBP*, 33 Kan. App. 2d 369, 102 P.3d 1169 (2004).

[15] There are musings in the file that claimant's failed back syndrome was attributable to her work activities but no claim was filed.

IT IS SO ORDERED.

Dated this _____ day of January, 2007.

_____
BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

CONCURRING AND DISSENTING OPINION

The undersigned Board Members agree with the majority's finding that claimant has been rendered realistically unemployable as a direct result of his work injuries and is, therefore, entitled to an award of compensation based upon a permanent total disability. We further agree that a credit for claimant's preexisting impairment of function should be applied to this award. However, the undersigned would follow the procedure outlined by the Kansas Supreme Court in *McIntosh*[16], whereby the credit is applied to reduce the dollar amount of the weekly disability payments, but the payments continue for the duration of the disability until the maximum total benefit is fully paid.

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BOARD MEMBER

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BOARD MEMBER

c: Michael L. Snider, Attorney for Claimant
Eric K. Kuhn, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge

[16] *McIntosh v. Sedgwick County,*__ Kan.___, P.3d ___ (2006) (Case No. 93,762, filed Dec. 8, 2006.)